

## The registry of property and other real rights in Kosovo *A critical review from a comparative perspective*

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### A. Introduction

In Kosovo, real rights (*iura in rem*) on immovable property can be acquired only through registration of the rights in the public register set up for this purpose. In the Kosovan legal system, a *numerus clausus* of real rights exists. Ownership, servitude, pledge, mortgage,

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building right (right of construction) and charge are the only available real rights.<sup>1</sup> In practice disputes arise about how to acquire a right on a certain thing. Therefore, the question how to resolve such disputes is a challenge to judicial authorities. Difficulties arise regarding the various legal bases which refer to the acquisition or loss of a real right, because rights are not always registered in fact. A lack of registration of the property rights creates in practice the need for informal transactions which reduces the security of transactions.

Nowadays, legal systems have adjusted the way to acquire rights, but differences exist depending on how acquisition is regulated. Kosovo has created a new system of registration of real rights.<sup>2</sup> This system shares similarities with some legal systems in Europe, mainly the Austrian and German systems. Therefore, the focus of the comparative remarks in this paper lies on those jurisdictions. Where appropriate, comparative remarks to the French legal system will be added, as an example of a system in Europe which is quite different.

The purpose of this paper is to describe the way to acquire real rights and the functioning of the registration system in Kosovo in a comparative perspective. There are legal discussions on the question how to acquire ownership and other real rights in the Kosovan law, although the current system explicitly requires the registration of rights in immovable property. Therefore, this paper will discuss in more detail how real rights are registered. It will also explain why registration has a constitutive rather than a declarative character. In this context it is very important to determine the moment of acquiring real rights as distinct from the contractual relationship, the possession in good faith or other forms of transfer of ownership and other real right. Informal transactions and legal consequences arising for the parties in case of failure to register the right will also be discussed.

## B. The definition of real rights

Real rights are rights that a subject (natural or legal person) has in a particular thing, namely a right to a thing (*iura in rem*). Within the territory of a country, a thing usually belongs to a respective owner, except for an abandoned thing (*res derelicta*) or things without an owner (if the owner is unknown). Nowadays it is very uncommon that a thing has no owner. Normally things either belong to the private persons or to the state. The focus of this paper lies on real rights in private property. Real rights in public property are regulated by specific laws and will not be discussed in detail.

The concept of real rights or otherwise *iura in rem* derives from ancient legal systems,<sup>3</sup> where legal shaping took place in Roman law.<sup>4</sup> In continental Europe the concept of real rights is recognized in all jurisdictions, while the system of registration of real rights in

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<sup>1</sup> See Aliu, Abdulla, E drejta sendore (real rights), Pristine 2014, See Statovci, Ejup, Property law relations on immovable property in Kosovo, Pristine, 1976, re-published in 2009, Law on basic property relation, Official Gazette of, SFRY, no.6/80.

<sup>2</sup> Law on Property and Other Real Rights (hereafter LPORR) of Kosovo is adopted on 25 June 2009, promulgated by decree of President on 15 July 2009, published in the Official Gazette of Republic of Kosovo no. 57/2009, 4 August 2009, entered into force 15 days after its publication, respectively on 20 August 2009, Law no.04/L-009 on amending and supplementing the Law no. 2002/5, on the establishment of the immovable property rights registry, Official Gazette of the Republic of Kosovo, no.7/10 August 2011.

<sup>3</sup> For more information see Statovci, Ejup, The Ownership, origin and development: comparative study, Pristine 1983, Republished in 2009.

<sup>4</sup> For more information related to real rights in Roman Law, see: Andrew Borkowski & Paul Du Plessis, Roma Law (E Drejta Romake), UET Press, Tirana, 2004, pp. 201-269.

immovable property differs.<sup>5</sup> The concept of real rights in Kosovo and registration are influenced mostly by the Austrian and German systems. Acquisition of a real right requires legal title and registration in the land registers.<sup>6</sup> Similarly, under positive law in Kosovo, real rights are established by legal title (*iustus titullus*) that is a legal transaction in the case of a derivative acquisition or a legal title for the original acquisition and the form of acquisition that is registration (*modus aquirendi*). The Law on Property and other real rights (hereafter LPORR)<sup>7</sup> states in Art. 36 (1):

*[T]he transfer of ownership of an immovable property requires a valid contract between the transferor and the transferee as a legal ground and the registration of the change of ownership in the immovable property rights register.*

For acquisition, change and termination of real rights in immovable property Art. 115 (1) states:

*Acquisition, variation, transfer and termination of ownership, a right of pre-emption or a limited right relating to immovable property require a legally valid contract and registration of the relevant transaction in the immovable property rights register.*

Even in case of original acquisition, ownership should be created by a valid, legal title and registration of the right in the register (*modus aquirendi*).

## I. What are real rights?

Rights in Kosovan private law are divided into personal rights and real rights. Real rights are rights on a certain thing (*iura in rem*). Various law provisions refer to the limited number of real rights that exist under Kosovan law (*numerus clauses*).<sup>8</sup> However, in Kosovan law the real rights are not explicitly listed, but according to the content of the law and relevant literature a numerus clauses exist. The real rights are considered to be ownership, servitude, mortgage, pledge, building right (superficies) and charge.<sup>9</sup> However, it should be noted that under the new law (LPORR) the *right of pre-emption* is included as a real right.<sup>10</sup> In contrast to the law in Kosovo, in some jurisdictions like Slovenia<sup>11</sup> and Germany<sup>12</sup> a non-accessory security right, the land debt or land charge (*Grundschild*) is considered a real right. Such a right does not exist in Kosovan law.

<sup>5</sup> See Hurndall, Anthony, *Property in Europe, Law and Practice*, Tottel Publishing Ltd, 2007.

<sup>6</sup> See Hurndall, Anthony, *Property in Europe, Law and Practice*, Tottel Publishing Ltd, 2007, Austria, pp. 3-33, Germany, pp. 213-248.

<sup>7</sup> Law on Property and Other Real Rights (hereafter LPORR) of Kosovo is adopted on 25 June 2009, promulgated by decree of President on 15 July 2009, published in the Official Gazette of Republic of Kosovo no. 57/2009, 4 August 2009, entered into force 15 days after its publication, respectively on 20 August 2009.

<sup>8</sup> See Slovenia Law on Property (Stvarnopravni Zakonik), Official Gazette, no. 87/17 August 2002, Art. 2, provide “Real rights are: **ownership, lien, land debt, easement, right of encumbrance, right of superficies**”, Croatia Law on Real Rights, Official Gazette of the Republic of Croatia, no. 91/96, 68/98, 13 7/99, 22/00, 73/00, and 114/01, Art. 1, stipulates, “Any natural person or legal entity may be the person having the right of **ownership and other real rights: servitudes, real burdens, the right to build and liens** on anything that may be the subject matter of such rights, unless provided otherwise by law”.

<sup>9</sup> See LPORR.

<sup>10</sup> See LPORR, Art. 115 (1), explicitly the right of pre-emption is foreseen as a real right and required to be recorded as other real rights. Art.115 (1) states: “Acquisition, variation, transfer and termination of ownership, a right of **pre-emption** or a limited right relating to immovable property require a legally valid contract and registration of the relevant transaction in the immovable property rights register”.

<sup>11</sup> Slovenia Law on Property, 2002, Art. 2.

<sup>12</sup> § 1191 BGB.

## II. Acquisition and loss of real rights in immovable property

In the legal system in Kosovo, a real right in immovable property (ownership, servitudes, mortgages, charges, a building right and the right of pre-emption) is acquired by a valid legal title (*iustus titullus*) and registration of the right (*modus aquirendi*) in the register of rights in immovable property (land registry). The legal title can be derivative (contract and will). Thus, a sales contract could be a legal title. In this case, the title is derivative because the right is obtained from a person who previously had the right. However, to acquire a right through a derivative title, registration is also prescribed. The sales contract on its own does not have any effect on the real rights, as registration is required as a constitutive condition.<sup>13</sup> In addition, registration is required for the acquisition of other real rights as well. A real right can also be acquired under an original title such as prescription in good faith, the decision of the state (expropriation) or the privatization agency.<sup>14</sup> Even in the case of original acquisition, registration is required as a condition for acquiring the right (*modus aquirendi*).

This will be illustrated by the example of acquisitive prescription. According to LPORR acquisitive prescription requires that the holder holds the property uninterrupted for 20 years in good faith.<sup>15</sup> However, the right will not be acquired automatically by fulfilment of these conditions. In order to obtain the right, it must be registered based on a court decision that confirms acquisitive prescription. Without registration the right is not acquired, and the person who is named in the registry continues to be the owner.

Some jurisdictions like Germany and Austria have similar conditions for the acquisition of real rights in immovable property. If the right is not registered, it is not established. If an agreement of the transfer of a real right is reached without registration, the situation is problematic, because in this case only possession can be transferred but not the real right. However, under French legislation for the transfer of the right of ownership, registration is not conditional; a contract of sale produces legal effects between the parties (*compromis de vente*), while the subsequent contract (*contract de vente*), which is the notarial deed, is required only for registration. Likewise, registration is required to establish the effectiveness of the contract in relation to third parties.<sup>16</sup>

## C. The functioning of the system of registration of real rights in Kosovo

### I. Historical development

The registration system of real rights in Kosovo has a separate history. Today, history continues to affect and have consequences on the acquisition and loss of rights in immovable property. The initial system is derived from Ottoman rule based on the law regarding *Tapia* (*Tapou*) in 1858. The *Tapia* was a document of ownership that identified an owner of immovable property. The system of *Tapia* (*Tapou*) continued to exist in the old Yugoslavia by

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<sup>13</sup> See LPORR, Art.115 (1)

<sup>14</sup> Law no.04/L-009 on amending and supplementing the Law no. 2002/5, on the establishment of the immovable property rights registry, Official Gazette of the Republic of Kosovo, no.7/10 August 2011.

<sup>15</sup> See LPORR, Art. 40 (1).

<sup>16</sup> Maitre Philippe Dubois, Property in Europe, Law and Practice, Sistemi Francez, in: Hurdall, Anthony (ed.), Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p.185.

the enactment of the Yugoslavian law on *Tapia (Tapou)* in 1931.<sup>17</sup> Later, the system was modified due to the influence of Austrian law. Therefore, a land register was established by the Law on Land Books in 1930. In addition, a cadastral system was established in some parts of Yugoslavia such as Slovenia, Croatia, Bosnia and Herzegovina and northern parts of Serbia.<sup>18</sup> In Kosovo no land register was introduced by that time. Instead, only in 1973 a cadastral registry—amended in 1980—was established, containing the name of the property, location, property charges, etc. In fact, it contained the same data as a land register.<sup>19</sup> Registration was recorded in a so-called possession list (*Fleta Poseduese*). The possession list (*Fleta Poseduese*) was recognized as proof of a real right. Meanwhile, in private law relationships the *Tapia (Tapou)* continued to exist in addition as a document of proof of ownership. From then on, the transfer of property rights could be conducted by the possession list issued based on data of the Cadastral Register. This situation continued until the adoption of the law on the establishment of the register of rights in immovable property (similar to Land Registry), established in 2002.<sup>20</sup> It was later amended in 2003<sup>21</sup> and 2011,<sup>22</sup> and by the law on cadastre 2003 as amended in 2011.<sup>23</sup> Currently, real rights are materially regulated in private law by a new act called law on property and other real rights (LPORR).<sup>24</sup> LPORR stipulates that if any *Tapia* was issued before 23 March 1989, a titleholder of the *Tapia* will be the owner.<sup>25</sup> If a *Tapia*, however, is issued after 23 March 1989, the validity of such *Tapia* has to be proved and recognized by a court decision.<sup>26</sup> The intention of this provision of the law is to secure the prior situation with different documents as a proof of ownership including any *Tapia* issued before the LPORR was introduced. However, after 2002 it was no longer possible to issue a *Tapia*. The Cadastral system continues to exist based on the new law on cadastre 2003 as amended in 2011 for census of lands, buildings, flats and in respect to technical aspects of the real rights. In contrast, it is no longer effective in private law.

<sup>17</sup> See Statovci, Ejup, Property law relations on immovable property in Kosovo, Pristine, 1976, re-published in 2009, p. 273.

<sup>18</sup> See Statovci, Ejup, Property law relations on immovable property in Kosovo, Pristine, 1976, re-published in 2009, pp. 272-273.

<sup>19</sup> See Aliu, Abdulla, E drejta sendore (real rights), Pristine 2014, pp.448-449, Law on Measurement and Land Cadastre, Official Gazette of the SFRY, 12/6/80.

<sup>20</sup> See Law no. 2002/5, on the establishment of the immovable property rights registry, promulgated by UNMIK regulation, no. 2003/27, 18.08.2003.

<sup>21</sup> Law no. 2003/13 as amended with Law no. nr.2002/5.

<sup>22</sup> Law no.04/L-009 on amending and supplementing the Law no. 2002/5, on the establishment of the immovable property rights registry, Official Gazette of the Republic of Kosovo, no.7/10 August 2011.

<sup>23</sup> Law, no. 04/L-13 on Cadastre, Official Gazette of Republic of Kosovo, no.13/1 September 2011.

<sup>24</sup> Law on Property and Other Real Rights, Official Gazette of Republic of Kosovo no. 57/2009, 4 August 2009, entered into force 15 days after its publication, respectively on 20 August 2009.

<sup>25</sup> LPORR, Art. 286 (1) stipulates: "In favor of persons who on the day of the coming into force of this law, are in possession of a *Tapia*-Deed issued before 23rd March 1989 stating that they or their legal predecessor are owner of an immovable property unit, it is presumed that they are the owners of the immovable property unit".

<sup>26</sup> LPORR, Art. 286 (3) stipulates, "Persons which at the day of coming into force of this law are in possession of a *Tapia* Deed issue dafter 23rd March 1989 stating that they or their legal predecessor are owner of an immovable property unit must have the Deed verified by the competent court of Kosovo in the procedure foreseen by the law".

## II. Creation of a new register for rights in the immovable property

The law on the establishment of the register of rights in immovable property (Law no. 2002/5)<sup>27</sup> has been a very important turning point in the registration system of ownership and other real rights in Kosovo. Thereby, the security of transactions concerning real rights has been increased. The register of real rights in Kosovo has a similar character as the registers in other jurisdictions, such as Germany and Austria. The following real rights can be registered: ownership, pre-emption, mortgages, servitudes, charges, and building right. According to Law no. 2002/5 the property rights which may be registered in the register have been changed as follows: ownership, mortgage, servitude, right of use of socially-owned property and state property.<sup>28</sup> Subsequently, Law no. 04/L-009 amending Law no. 2002/5 added other property rights that may be recorded in the register: the right of use of municipal property and the right of use of public property, charges and other proprietary liens.<sup>29</sup> However, under the law on property and other real rights (hereinafter LPORR), which regulates property rights in private property, the following are currently considered to be real rights: ownership, pre-emption, pledge, mortgage, servitude, charge and building right.<sup>30</sup> All these real rights are recorded in the register of rights in immovable property, which is located in the Municipal Cadastral Offices on the location of immovable property.<sup>31</sup>

## III. The function of registration

Real rights in immovable property can be established only by registration. Art. 115 LPORR requires that two conditions are fulfilled: a) legal title and b) registration of the right in the register.<sup>32</sup> In this regard, we can conclude that registration is of a constitutive nature. Therefore, any real right created or transferred after 2002 which is not registered is legally considered as not existing. After a transitional period, this also holds true for real rights validly established by other means before the registration became a pre-requirement for the establishment of a real right in Kosovo. According to Art. 295 (3) LPORR, a request for registration must be submitted to the register within 3 months after LPORR entered into force for any real right which is not registered if registration is foreseen by Law no. 2002/5. Otherwise, this real right is terminated. A person may have valid legal title (e.g. a contract, a will or decision of a government body), but if the right is not registered, that person can only become a possessor in good faith, but s/he will not acquire the real right itself.

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<sup>27</sup> See Law no. 2002/5 on the establishment of the immovable property rights registry, promulgated by UNMIK Regulation, no. 2003/27, 18 August 2003.

<sup>28</sup> See Law no. 2002/5, Art. 2 (1).

<sup>29</sup> See Law no. 04/L-009 on amending and supplementing the Law no. 2002/5, on the establishment of the immovable property rights registry, Official Gazette of the Republic of Kosovo, no.7/10 August 2011, Art. 3.

<sup>30</sup> Law on property and other real rights (LPORR), Official Gazette of the Republic of Kosovo, no. 57/2009.

<sup>31</sup> See Regulation no. 2001/5 on pledges; Regulation, no.2001/ 32 on the establishment of the Pledge Office; Law no.04/L-136 on the registration of a pledge in the registry of movable property, Official Gazette of the Republic of Kosovo, no.33/23 November 2012.

<sup>32</sup> See LPORR, Art.115 (1).

A similar rule exists in Germany. In the German Civil Code (BGB) registration is constitutive for the creation or transfer of real rights in immovable property.<sup>33</sup> Also, priority of a proprietary right is determined by the order of registration. The right which is registered first has priority over rights which are registered later.<sup>34</sup>

It also needs to be discussed which rights are acquired by a person who has not registered the personal right to property. In this case, we speak in Kosovo of an informal transaction. If ownership is to be transferred pursuant to a sale, the buyer may not register the ownership. If a transaction is practically executed in this way, the buyer becomes thereby only a possessor. Even in the relationship between the contracting parties, the buyer has a right to receive the real right through registration only but does not have a real right her/himself. In this context, we find a different example in the French legal system. Here, ownership can be acquired by contract in relationship between the parties, while registration is only required to give it effect in relation to third parties.

#### **IV. The registration records establish only presumption of rights**

The register of rights in immovable property does not follow the principle of absolute accuracy. In Kosovo the register creates only a legal presumption, that is, that the data registered are assumed to be true until proven otherwise.<sup>35</sup> Correction of the register is permitted on request of a person who claims to have a right not registered. That claim is settled by the competent authority—the court or agency of property. After the court decision or the decision of any other authority foreseen by law (e.g. Property Agency), the correction of registration may take place.<sup>36</sup> There is a presumption that there can be errors in the register. Therefore, recertification of registration is possible by proving to the contrary of what is recorded in the register. In contrast, it is legally presumed in the German Civil Code (BGB) that the land register is correct. If the right is deleted from the register, it is considered that the right no longer exists.<sup>37</sup> In order to be effective, notifications of objections to the correctness of the register must be made to the acquirer of a right at the time of applying for registration of the right.<sup>38</sup> Thus, the acquisition of a right in good faith is always possible based on the data of register, unless the buyer has received a notice that the registration is defective before her/his right had been registered.<sup>39</sup> In general, correction the register re-

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<sup>33</sup> See Gerhard Weigen, Stefan Lingemann, Wolfgang Spoerr, Edgar Jousen, Dirk Wasmann, Eckhart Schweyer and Christopher Kuner, Property in Europe, Law and Practice, Germany, in: Hurndall, Anthony (ed.), Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, pp. 219-220.

<sup>34</sup> See LPORR, Art. 118.

<sup>35</sup> Law no.2002/5 on the establishment of the immovable property rights registry, Art. 5.

<sup>36</sup> For more information see Law.no.2002/5 on the establishment of the immovable property rights registry, Art. 5 (4).

<sup>37</sup> Compare, § 891 (1) BGB, "If a right has been entered in the Land Register for a person, it is presumed that the person is entitled to this right. 2) If a right entered in the Land Register is deleted, it is presumed that the right does not exist".

<sup>38</sup> See § 892 BGB.

<sup>39</sup> See Gerhard Weigen, Stefan Lingemann, Wolfgang Spoerr, Edgar Jousen, Dirk Wasmann, Eckhart Schweyer and Christopher Kuner, Property in Europe, Law and Practice, Germany, in: Hurndall, Anthony (ed.), Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, pp. 219.

quires approval of the person registered.<sup>40</sup> If this person registered in the land register refuses the correction, her/his consent can be replaced by a court decision.<sup>41</sup>

## D. Ownership of immovable property<sup>42</sup>

### I. Acquisition of ownership of immovable property

The right of ownership in immovable property is acquired by: 1) legal title (*iustus titullus*) that could be a derivative title or an original title and 2) the mode of acquisition (*modus aquirendi*), i.e. the registration of the right.

### II. Registration

Ownership of immovable can be established only by registration of the right in the registry. The nature of registration is of a constitutive character because as noted above a right may be acquired only after it is registered. There can be no acquisition of ownership in immovable property without registering the right. Art. 36 (1) LPORR states:

*for the transfer of ownership in immovable property is required a valid legal transaction between the seller and the buyer as the legal basis and the registration of change of ownership in the Register of immovable property rights.*

Let us assume a situation in which a person has purchased an immovable object (land, building or flat) and has a valid legal title i.e. a contract of sale, which must be notarized, but the right is not registered. It may also be the case when there is only a written contract which is not notarized, or the seller cannot transfer the right of ownership because it is not registered under her/his name. In those cases, only possession can be transferred. As an effect, the buyer cannot register the right and therefore cannot become the new owner. The factual and legal situations do not match.

Under Austrian law, acquisition of ownership may be effectuated by legal title (e.g. contracts), but the right must be registered in a register maintained by the local court (*Bezirksgerichte*), since without registration parties have only a contractual relationship. Although the transfer of possession can take place earlier, the buyer does not become the new owner without registering.<sup>43</sup> A similar concept can also be found in German law, where property is acquired only after registration of the right.<sup>44</sup> Unregistered persons cannot make the transfer of rights in immovable property. With the exception of the case of inheritance, title (the right) can be established only by registration in the land register (*Grundbuch*),

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<sup>40</sup> See § 894 BGB.

<sup>41</sup> See Gerhard Weigen, Stefan Lingemann, Wolfgang Spoerr, Edgar Jousen, Dirk Wasmann, Eckhart Schweyer and Christopher Kuner, Property in Europe, Law and Practice, Germany, in: Hurndall, Anthony (ed.), Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p. 210.

<sup>42</sup> According to the laws in Kosovo, the term "immovable property" means land and all that is attached with the land (buildings, installations embedded in the ground, etc.). The owner of land is considered the owner of the building unless, has created particular right in the building, e.g construction right. Regarding the concept of ownership by LPORR see Haxhi Gashi, Acquisition and loss of ownership under the Law on Property and Other Real Rights (LPORR): The Influence of the BGB in Kosovo Law, *Hanse Law Review*, Vol. 9, No.1, pp. 41-60, p. 55.

<sup>43</sup> See Ivo Deskovic, Property in Europe, Law and Practice, Austria, in: Hurndall, Anthony (ed.), Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p. 10.

<sup>44</sup> Compare & 873 (1) (2) BGB.

with the records held by a division of the local court (*Amtsgericht*).<sup>45</sup> As known, the German system differentiates the contractual obligations (*schuldrechtlicher Vertrag*) and the contract for the transfer of legal title (*dinglicher Vertrag*) according to the principle of abstraction (*Abstraktionsprinzip*). In order to acquire title in immovable property, the following conditions are required: a) the agreement for the transfer of the real right (*dinglicher Vertrag*) separate of and independent to the contract of sales and b) the registration of transfer of title in the register.<sup>46</sup> The contract of sale on which the transaction is based (cause) is not a requirement for the transfer of a real right.

In those jurisdictions, practically it may happen that informal transactions accrue where transactions are made without registration. In fact, that seems to be a problem in Kosovo. In this case the real right legally remains with the person who is registered as right-holder, but s/he might be personally under a contractual obligation to transfer ownership. The buyer who is then not the owner can, if not authorized by the legal owner, transfer only possession but cannot transfer ownership to subsequent buyers. As a consequence, the seller shall be contractually liable to the buyer for compensation of losses due to the sale of the property with lack of legal title.

### **E. Other real rights (*iura in rem aliena*)**

Limited real rights in a thing are rights where the owner of the property under an agreement or law establishes a right of another person in her/his property. Within the authority over a thing, an owner can also allow other limited rights such as the right to lease,<sup>47</sup> or other rights such as servitudes or mortgages. The rights of the holder of a pledge, mortgage, servitude, right of building, charge or other immovable lien, long-term lease, etc., are rights in the foreign thing (*iura in rem aliena*). The acquisition of those rights will be discussed separately in the chapters that follow.

### **F. Right of pre-emption**

The LPORR specifically foresees the right of pre-emption as a real right in immovable property.<sup>48</sup> This real right in immovable property (or joint ownership of immovable property) may be encumbered in such a manner that another person has a right of pre-emption.<sup>49</sup>

### **I. The establishment of the right of pre-emption**

The right of pre-emption can be established by law or by contract. The contractual right of pre-emption is established by agreement between the owner of the immovable property and the person entitled to the pre-emption. The right of pre-emption becomes effective against

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<sup>45</sup> See Gerhard Weigen, Stefan Lingemann, Wolfgang Spoerr, Edgar Joussen, Dirk Wasmann, Eckhart Schweyer and Christopher Kuner, Property in Europe, Law and Practice, Germany, in: Hurndall, Anthony (ed.), Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p. 219.

<sup>46</sup> See Gerhard Weigen, Stefan Lingemann, Wolfgang Spoerr, Edgar Joussen, Dirk Wasmann, Eckhart Schweyer and Christopher Kuner, Property in Europe, Law and Practice, Germany, in: Hurndall, Anthony (ed.), Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p. 219.

<sup>47</sup> See Smith, Roger J., Property law, Third Edition, New York, 2000, p. 4.

<sup>48</sup> See LPORR, Chapter IV.

<sup>49</sup> LPORR, Art. 44 (1).

third parties once it is entered into the immovable property rights register.<sup>50</sup> The right of pre-emption may be granted for one or more instances of purchase but is restricted to the sale by the owner who owned the immovable property at the time of the granting of the right of pre-emption or by her/his heirs.

## II. Registration

Registration of the pre-emption is not constitutive as such, but it is necessary to be effective against third parties. The LPORR refers for more details to the law on obligation when it comes to the relationship between the owner of immovable property and the entitled person of the right of pre-emption.<sup>51</sup> LPORR, Art. 46 (1) states:

*In exercising the right of pre-emption, a contract is concluded between the person exercising the right of pre-emption and the person obligated under this right in accordance with the terms agreed between the person obligated and the purchaser.*

In order to be effective against third parties LPORR, Art. 44 (2), last sentence states:

*The right of pre-emption becomes effective against third parties once it is entered into the immovable property rights register.*

Some other requirements are foreseen in Art. 46 (2), which stipulates:

*Against third parties the right of pre-emption has the effect of a priority notice given for the purpose of securing a claim for the transfer of ownership of the immovable property.*

## G. Excuse: Pledge in movable property

A pledge is a real right in a thing (*res*) on the basis of which the debtor, i.e. the pledgor (or another person that leaves the pledged thing) leaves the pledged thing (collateral) to cover the claim of the creditor, i.e. the pledgee. The purpose thereof is to secure the claim of the creditor with the value of the pledged thing if the debtor does not fulfil her/his obligation in due time. In this paper, we address immovable property rights. However, we take a look at the pledge to distinguish it from mortgage. According to LPORR, a pledge can be established over movable property and rights (collateral) that can be transferred by law.<sup>52</sup> A pledge may be: 1) possession pledge when possession of the pledged property passes to the creditor, i.e. the pledgee or 2) registered pledge (non-possessor), when possession of the pledged property remains with the debtor but the pledge is recorded in the pledge register. A registered pledge is considered the standard pledge because it is the favourite form and a frequent security claim of creditors. It was regulated for the first time in Kosovo in UNMIK Regulation 2001/5 on the pledge. Today, the LPORR of 2009 regulates the pledge.<sup>53</sup> Through the pledge, the creditor obtains the right over items of the debtor (the pledgor may be the debtor her/himself or another person who leaves her/his pledged property on behalf of the debtor) to sell the object of pledge with the execution procedure and the value of sales at auction perform public demand. The remainder of the amount sold that exceeds the

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<sup>50</sup> LPORR, Art. 44 (2).

<sup>51</sup> LPORR, Art. 50.

<sup>52</sup> LPORR, Art. 138 (1).

<sup>53</sup> See Gashi, Haxhi, The notion and registration of the non-possessory pledge, Law Review, no.1/2006, Faculty of Law, Pristine, 2006, p. 187-189.

value of the claim is returned to the debtor or to the owner of the pledged item. A pledge, however, can by definition be established only on a movable thing.

## H. Mortgage

The mortgage is established on immovable property, unlike a pledge that is established on movable property. Same as the pledge, the purpose of the mortgage is to ensure the creditor's claim. A mortgage is created on immovable property and recorded in the register of rights in immovable property.<sup>54</sup> As in the case of the registered pledge, possession is not passed.

### I. Establishment and types of mortgage

Kosovan law recognizes three types of mortgages: contractual mortgages, legal mortgages and judicial mortgages. Establishing a contractual mortgage requires two conditions: 1. a contract as legal title and 2. registration.<sup>55</sup> Beside contractual mortgages defined in the LPORR, mortgages created by law (legal mortgages) may exist. The LPORR does not specify cases of legal mortgage. However, such a case can be found in the law on real estate property taxes when immovable property shall be mortgaged if property taxes are not paid on time.<sup>56</sup> Other cases are not mentioned explicitly by law. However, in other legal systems like France, legal mortgages are considered for purposes of taxation and mutual spouses conjugal obligations.<sup>57</sup> A judicial mortgage can be established by a court's decision on immovable property of the debtor during the enforcement procedure. This concept of judicial mortgage also exists in French law.<sup>58</sup> Under Austria law, the court may issue a decision to ensure the creditor's claim and establish a judicial mortgage on immovable property of debtor as well.<sup>59</sup>

### II. Registration of mortgage

The registration of mortgage is a condition to establish a mortgage.<sup>60</sup> Registration of mortgage is the acquisition form (*modus aquirendi*) and applies to contractual and judicial mortgages, which is foreseen almost in all western legal systems.<sup>61</sup> Under Kosovan law, in case of registration of mortgage, a certificate will be issued as proof of the establishment of the mortgage. This shows that the registration of a mortgage is of a constitutive character. Extinction of a mortgage will be done by deleting the registration.<sup>62</sup> A mortgage that has not been registered is not considered as established and cannot be enforced. Likewise, a mortgage that has not been registered has no effect against third parties. If a sold item is

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<sup>54</sup> LPORR, Art. 173.

<sup>55</sup> LPORR, Art. 173.

<sup>56</sup> See Law no 03/L-204 on taxes on the immovable property, Official Gazette of the Republic of Kosovo, no. 88/25 November 2010, Art. 18.

<sup>57</sup> Piko, Ivs, Right of Pledge, Presses Universitaires de France, 2008 6, avenue Reille, 75914 Paris, pp. 395-397.

<sup>58</sup> Piko, Ivs, Right of Pledge, Presses Universitaires de France, 2008 6, avenue Reille, 75914 Paris, pp. 395-397.

<sup>59</sup> See Ivo Deskovic, Property in Europe, Law and Practice, Sistemi Austriak, nê: Hurndall, Anthony, Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p. 7.

<sup>60</sup> LPORR, Art. 194.

<sup>61</sup> Statovci, Ejup, The right of pledge, A comparative view, Prishtine, re-printed, 2009, pp. 253-254.

<sup>62</sup> LPORR, Art. 193.

charged with a mortgage and the mortgage was registered, the thing sold is charged with the mortgage. The mortgage creditor has the right to claim the thing wherever situated and to sell it by enforcement procedure to fulfil her/his demand. On the contrary, the contract alone does not produce legal effects. Also in other legal systems, e.g. in Germany, a mortgage is established only by registration in the Land Register.<sup>63</sup>

## I. Servitude

Servitudes are real rights in a foreign thing, where the holder of the right of servitude has the right to use in a certain way a thing (served property). The owner of the land encumbered by servitude is required to bear or abstain from exercising certain rights on her/his property in favour of the holder of the servitude.<sup>64</sup> So, servitude is a real right over the property of another person.<sup>65</sup> Servitudes are created for the benefit of the person, i.e. personal servitudes or as real servitudes, i.e. servitudes on benefit of things. Personal servitudes are considered: right of use (*usus*) the right of usufruct (*uzufruktus*) and tenure, i.e. right of residency (*habitation*).<sup>66</sup> The real servitudes are created in immovable property and may be field servitudes (e.g. flow of water or the right of way) and urban servitudes.

### I. The types and establishment of the right of servitude

In the LPORR only the servitude of usufruct is regulated separately and named, while other servitudes are regulated in separate legislation. However, from the provisions that regulate servitudes (specific sections) follows the possibility to create other personal servitudes (servitudes in favour of persons and limited to the life of that person)<sup>67</sup> and real servitudes associated with the land or building (for the benefit of the land or building) which are regulated in a specific chapter.<sup>68</sup> Also in Austrian law, there is a division of real servitudes and personal servitudes. Real servitudes (*Felddienstbarkeiten*) are real rights in land such as the right of way, the right of passage of animals, or the right to graze livestock (*Weidedienstbarkeiten*).<sup>69</sup> The concepts of personal and real servitudes exist as well in other legal systems, e.g. in German law, where limited personal servitudes (*beschränkt persönliche Dienstbarkeiten*) relate to the person, while real servitudes are associated with a thing,

<sup>63</sup> See German Civil Code (BGB), & 873 (2), and & 1115.

<sup>64</sup> See Ivo Deskovic, Property in Europe, Law and Practice, Austria, in: Hurndall, Anthony, Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p. 6.

<sup>65</sup> Statovci, Ejup, E drejta e servituteve (right of servitudes), A comparative view, Prishtine 1985, re-printed in 2009, p. 75.

<sup>66</sup> See Aliu, Abdulla, E drejta sendore (pronësia) – The Real Rights (Property), Prishtine 2014, p. 275. See also LPORR, Art. 218, 252, 261 and 264.

<sup>67</sup> See LPORR, Art. 261 that stipulates, “A personal servitude is the right of the person for whose benefit the immovable property unit has been encumbered entitling him to use the immovable property unit in a specific way or to require certain actions to be omitted or to refrain from exercising a right that arises out of the immovable property unit”. Art. 263, “1) A personal servitude terminates with the death of the entitled person, 2) A personal servitude granted to a legal person or a partnership with legal personality terminates when the entity ceases to exist”.

<sup>68</sup> See LPORR, Art. 252, that states, “A real servitude is an encumbrance of an immovable property (subservient plot) that grants the owner of another immovable property (dominant plot) the right to use the subservient plot in a specific manner, or to require that particular acts are not undertaken on the subservient plot, or to exclude the exercise of a right arising from the ownership of the subservient plot in relation to the dominant plot”.

<sup>69</sup> See Ivo Deskovic, Property in Europe, Law and Practice, Austria, in: Hurndall, Anthony, Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p. 6.

i.e. land.<sup>70</sup> Under Kosovan law, personal servitudes are created in movable and immovable property but are connected with a person and limited in time.<sup>71</sup> Real servitudes created in immovable property usually have no time limits.<sup>72</sup> However, it is important to note that the establishment of all servitudes required two conditions: title and registration.<sup>73</sup>

## II. Registration of servitude

Servitudes on immovable property can be established only upon registration. This is the only way of acquiring the right. A servitude which is not registered is not considered established.<sup>74</sup> Registered servitudes, on the contrary, will also have third party effect. The reason why registration is regarded to be constitutive is that third parties, in fact, may obtain knowledge of the servitude only if it is registered.

If a person is not registered as a holder of the right of servitude, s/he cannot transfer the right to the other persons. Third parties are also protected if they bought the right by a person who has registered the right.

Under Austrian law the acquisition of a servitude requires: 1) notarized agreement between the parties and 2) the registration of the servitude in the register. However, under Austrian law there is a rule as to the acquisition of servitudes by prescription. A servitude could be acquired by prescription in good faith within 30 years.<sup>75</sup> Under the new law in Kosovo, i.e. LPORR, acquisition of a servitude by prescription is not foreseen. Such a rule was contained in the law of 1980, i.e. the Law on basic property relations, under which the servitude could be obtained by prescription in good faith in the same way as ownership within 20 years.<sup>76</sup> This possibility, however, no longer exists in Kosovo.

## J. Charge

A charge is a real right that represents a burden on an object. Art. 265 (1) LPORR defined charges as follows:

*1) Any immovable property may be encumbered in such a manner that recurring performances are to be rendered to a beneficiary on account of the immovable property (charge). 2) A charge may be created for the benefit of a person (personal realty charge) or in favour of the current owner of another immovable property (realty charge).*

<sup>70</sup> See Gerhard Weigen, Stefan Lingemann, Wolfgang Spoerr, Edgar Jousen, Dirk Wasmann, Eckhart Schweyer and Christopher Kuner, Property in Europe, Law and Practice, Germany, in: Hurndall, Anthony, Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, pp. 215-216.

<sup>71</sup> See LPORR, Art. 115 in connection to Art. 218 and 263.

<sup>72</sup> See LPORR, real servitudes, Art. 115 in connection with Art. 252 And Art. 253.

<sup>73</sup> See LPORR, Art. 222.

<sup>74</sup> See Art.115, and Art. 253 that states" 1) A real servitude may be established by a legal transaction, a decision of a state body, or by law. 2) A contract establishing a real servitude requires the written agreement of the parties setting out the content of the real servitude and the entry of the real servitude in the immovable property rights register. The contract must contain the agreement of the parties that they want to establish a real servitude and its content.

<sup>75</sup> See Ivo Deskovic, Property in Europe, Law and Practice, Austria, in: Hurndall, Anthony (ed.), Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p. 6.

<sup>76</sup> See Law on basic principles of property relations, 1980, Art. 54.

## **I. Establishing a charge**

A charge may be established by contract or by law. The contract or the laws are a legal title. A charge based on a contract requires that the contract is notarized and registered in the register of immovable property rights. In the case of legal charge, LPORR does not contain clear rules on the establishment.

## **II. Registering a charge**

Like other real rights, a charge must be recorded in order to be created, i.e. registration is constitutive. The LPORR specifically requires registration of contractual charges. However, for legal charge it does not clarify how it is created and if the registration is required, resulting in a situation without sufficient legal certainty.

## **K. Right of building**

The building right (*superficies*) is a real right in an object in a way that there is ownership of the land and separate ownership of the building on that land. This right is a limited right for a certain time period established for a maximum of 99 years. The right of building establishes two types of ownership: the rights of the landowner and the rights of the owner of the building.

### **I. The establishment of the right of building**

The right of building can be created by agreement as a legal title (*iustus titullus*) and registration of the right in the register (*modus aquirendi*). Without registration the building right is not established. This system is similar to the one in France, where the right of construction (building) is established by notarized agreement and registration to be effective in relation to third parties during a period of 18 to 99 years.<sup>77</sup>

### **II. Registration**

Registration is required to establish a building right. Due to the fact that LPORR provides that legal title and registration are conditions for the acquisition of a building right,<sup>78</sup> it should be understood that the legal effects between the parties also arise only after registration. This should increase legal certainty. Also, in relation to third parties it is clear that a building right has effect only after registration.

## **L. Summary**

The registration of real rights in Kosovo is a precondition for acquisition of any real right, with the exception of the right of pre-emption in relationships between the contracting parties. The new registration system of real rights established in 2002 is known as the register for registration of rights in immovable property. The registration of real rights is a con-

<sup>77</sup> Maitre Philippe Dubois, Property in Europe, Law and Practice, Austria, in: Hurndall, Anthony (ed.), Property in Europe, Law and Practice, Tottel Publishing Ltd, 2007, p. 182.

<sup>78</sup> See LPORR, Art. 273.

stitutive element for the creation of real rights relating to immovable property. Kosovan law considers as real rights: ownership, right of pre-emption, servitude, (pledge in movable property), mortgage, right of building and charge.

In order to acquire any real right, two conditions are required: legal title (*iustus titulus*), i.e. contract, will, decision of state body or prescription (derivative or original title) and the acquisition form that is registration (*modus aquirendi*). The LPORR specifically requires registration of real rights in the registry established for that purpose. Compared to other jurisdictions, the Kosovan system shares similarities with the Austrian and German systems for registration (*Grundbuch*) of the real rights in immovable property.

The registration record in Kosovo is presumed to be correct until the contrary is proven. It allows for correction of the register only by decision of the court or other agencies foreseen by law (for example agency of property). Based on the decision of the court/agency the register will be corrected. The register has legal effect between parties and also against third parties. Without registration a real right is not acquired.